

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Request for Review by Network Enhanced)	WC Docket No. 06-122
Telecom, LLP, of Decision of Universal)	
Service Administrator)	
)	

COMMENTS OF THE AD HOC COALITION OF INTERNATIONAL
TELECOMMUNICATIONS COMPANIES

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I. Introduction

On June 29, 2009, Network Enhanced Telecom, LLP (“NetworkIP”) filed a request (“Request”) with the Federal Communications Commission (“FCC” or “Commission”) for review of the findings in its 2008 Universal Service Administrative Company (“USAC”) audit.¹ In its Request, NetworkIP challenged USAC’s instructions directing NetworkIP to reclassify certain revenues reported as wholesale revenue as end-user revenue, subject to Universal Service Fund (“USF”) contribution obligations. The Ad Hoc Coalition of International Telecommunications Companies (“Coalition”) believes that this forced reclassification of wholesale revenue as “end-user” retail revenue is unreasonable and unlawful and hereby files comments supporting NetworkIP’s Request for the following reasons.²

II. USAC Cannot Exceed the FCC’s Rules or Congress’ Intent in Interpreting a Carrier’s Obligations under the Carrier’s Carrier Rule

According to the Telecommunications Act of 1996, “all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and

¹ *In the Matter of Request for Review by Network Enhanced Telecom, LLP, of Decision of Universal Service Administrator*, Request for Review of Network Enhanced Telecom, LLP of a Decision of the Universal Service Administrator in a Contributor Audit, filed Jun. 29, 2009 (“Request”).

² The Coalition represents domestic and international companies, including prepaid calling card providers, committed to USF reform. The Coalition aims to ensure an equitable and non-discriminatory contribution program to support a sustainable USF that guarantees affordable universal service for all Americans. See *In the Matter of the Ad Hoc Coalition of International Telecommunications Companies’ Petition for Declaratory Ruling Regarding Universal Service Fund Contributions*, Petition of the Ad Hoc Coalition of International Telecommunications Companies for Declaratory Rulings that: (1) Qualifying Downstream Carriers May Choose Either to Accept Supplier Pass-through Surcharges or Pay Universal Service Fees Directly; And (2) Prepaid Calling Card Providers’ Distributor Revenues are Not “End-user” Revenues and Allowing Reporting of Actual Receipts Only, or in the Alternative, to Initiate a Rulemaking to Address these Issues, filed Feb. 12, 2009 (“Coalition Petition”); Reply Comments of the Ad Hoc Coalition of International Telecommunications Companies (“Coalition Reply Comments”), filed June 22, 2009.

advancement of universal service.”³ Pursuant thereto, the FCC created the Universal Service Fund and directed USAC to oversee revenue reporting and collection.⁴ All qualifying carriers pay contributions based upon their interstate and international end-user revenues.⁵

The “Carrier’s Carrier Rule” (“CCR”), as it has come to be known, reflects an FCC policy which is intended to ensure restriction of USF contributions to end-user revenues in order to avoid duplicative USF contribution at both the wholesale and retail levels.⁶ The CCR exempts wholesalers from contributions as long as they take reasonable measures to ensure they are selling telecommunications to resellers and not retail, end users. The rule, as enunciated by the FCC, has never obligated wholesalers to implement bulletproof measures to make absolutely certain their retail customers are contributing to the USF, yet that is precisely what USAC has done. The actual language of the CCR, as adopted by the FCC provides that:

An underlying contributor should have documented procedures to ensure that it reports as revenues from resellers only revenues from entities that *reasonably would be expected* to contribute to support universal service.⁷

Today, USAC requires very specific certification, verification, and documented validation procedures. These USAC procedures far exceed the Commission’s intent, which clearly placed the burden of conceiving and implementing adequate documented procedures

³ 47 U.S.C. § 254(d).

⁴ 47 C.F.R. § 54.701(a); *In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association*, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd. 25058, 25069-70, ¶ 20 (1998).

⁵ 47 C.F.R. § 54.706(b); 47 C.F.R. § 54.709(a).

⁶ See, e.g., *Vonage Holdings Corp. v. FCC*, 376 U.S. App. D.C. 396, 401 (2007).

⁷ *In the Matters of Changes to the Board of Directors of the National Exchange Carrier Association; Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 18400, 18508 (Jul. 1997) (emphasis added).

on wholesale, underlying carriers. The CCR enunciated by the FCC does not now and never has authorized USAC to devise specific procedures, much less give USAC any enforcement authority in this area. The Coalition believes USAC exceeded its delegated authority, and the specific procedures it adopted over the years and applied in its audit of NetworkIP are *ultra vires* and unenforceable.

The FCC's language reveals a clear intent to give wholesalers freedom and flexibility to interpret the rule and to adopt customer verification procedures sufficient to satisfy the wholesaler. There is no indication the FCC ever intended for its language to give USAC a "blank check" on which to write the inflexible, unyielding, and -- as proven by marketplace experience -- unworkable carrier's carrier reporting instructions which now reside in the Form 499-A instructions.

USAC, as administrator of the USF, is merely a collection agent and cannot make or interpret FCC policies or rules. USAC collects revenue data via telecommunications reporting worksheets on an annual and quarterly basis.⁸ USAC is also authorized to draft instructions to assist filers in completing FCC Forms 499-A and 499-Q, respectively. USAC's Form 499-A instructions do, in fact, recite the specific FCC CCR language.⁹ Under its delegated authority,

⁸ See *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Order (2000) (discussing USAC's role as a data collection agent for the FCC).

⁹ "Each filer should have documented procedures to ensure that it reports as 'revenues from resellers' only revenues from entities that *reasonably* would be expected to contribute to support universal service." Instructions to Telecommunications Reporting Worksheet, FCC Form 499-A (2009) ("Instructions") at 19 (emphasis added). Note, although the audit for which NetworkIP seeks review pertained to prior years' revenues, the 2009 instructions do not substantially differ from earlier versions where cited herein.

USAC was authorized to look no further than the rule because USAC occupies a purely ministerial role. USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where an Act or the Commission’s rules are unclear, or do not address a particular situation, USAC shall seek guidance from the Commission.”¹⁰ But, in devising and enforcing the very specific certification, verification, and documented validation procedures presently set forth in the Form 499-A instructions, USAC has done exactly what it is prohibited from doing. It not only made “policy,” it also interpreted rules and Congressional intent when it imposed vicarious liability on wholesale providers. USAC substituted its judgment for that of both the FCC and Congress when it set up a system which imposes contribution liability on wholesale telecommunications providers that failed to adopt carrier’s carrier revenue reporting procedures – procedures that USAC created, without consultation with the FCC and without input from the public.

In its Request, NetworkIP argues that USAC improperly rejected certifications which demonstrated that a vast majority of its resale customers were not merely reasonably expected to be USF contributors but, in fact, were direct contributors. The Coalition finds USAC’s determinations to be arbitrary and capricious in and of themselves but, more so, the Coalition finds the result, which is the imposition of verifiably duplicative contribution liability, to be beyond the pale.

¹⁰ 47 C.F.R. § 54.702(c). The FCC retains the authority to overrule USAC’s actions in administering the universal service support funds; those who are aggrieved by USAC, its committees, or its Board may seek review from the FCC. *Id.* at § 54.719(c). USAC instructions are not “rules” but rather non-binding guidance, without the weight of enforceable regulations, and are clearly subordinate to FCC rules. *See, e.g.,* IDT Telecom, Inc. Comments supporting Coalition Petition at 8; Coalition Reply Comments at 4.

Specifically, USAC faulted NetworkIP's certifications because they excluded 499 Filer ID information, were over a year old, and failed to record NetworkIP's review of the FCC's website which lists carriers by 499 Filer ID and identifies them as either contributors or non-contributors.¹¹ In making these determinations, USAC interpreted an FCC rule, exceeding the scope of its delegated authority. In rejecting NetworkIP's documents, USAC interpreted the FCC's directive that documented procedures for identifying direct contributors be reasonable.

In short, USAC construed the FCC's understanding of the term "reasonably" to either exclude certain documentation procedures or affirmatively require them. The Commission, however, has not directed USAC to apply the rule subjectively. Rather, the FCC outlined the underlying carrier's obligation under the CCR as a responsibility to "perform due diligence to help ensure that all end-user revenues are captured."¹² USAC only has the authority to mechanically apply this FCC rule - in other words, to identify whether or not a carrier performed due diligence. Nothing in the FCC's rules or guidance authorizes USAC to subjectively scrutinize the procedures adopted by the carrier to meet its obligations or to evaluate the sufficiency thereof. The actions undertaken pursuant to USAC's audit of NetworkIP exceed its authority and are therefore invalid. USAC further exceeded its authority by ascribing to its instructions the weight and force of substantive FCC rules. In other words,

¹¹ Notably, under FCC rules, wholesale carriers may visit the FCC's website, which lists each 499 filer and the contributor status assigned by USAC based on that filer's Form 499 submissions, but are not obligated and, indeed, cannot under Commission rules rely exclusively on this method of verification. See Instructions at 19. Further, as NetworkIP points out, the website is not fool-proof and often contains errors. Request at 20.

¹² *In the Matter of Petition for Review of American Cyber Corp. et. al.*, Order, 22 F.C.C.R. 4923, 4928 ¶ 15 (2007).

USAC interpreted its instructions as substantive rules authored by the FCC. USAC, however, is not authorized to make rules and so exceeded its authority.¹³

To the extent the Commission, in its recent *Global Crossing Order*, sanctioned USAC's excessive exercise of power, the Coalition respectfully disagrees with the Commission's position on this issue.¹⁴ Specifically, in response to a request for review of a USAC audit decision by Global Crossing Bandwidth, Inc., the Commission retroactively sanctioned unauthorized acts committed by USAC. In the Order, the FCC found that USAC was justified in interpreting the mandates of the CCR.¹⁵ However, while the Commission may promulgate rules that expand USAC's authority prospectively, it may not retroactively approve of actions which exceeded USAC's authority when taken.

The Coalition maintains that despite the *Global Crossing Order*, USAC's actions interpreting the reasonableness requirement contained in the FCC's CCR exceed the scope of its delegated authority. Because USAC exceeded the scope of its authority in making this interpretation as part of the NetworkIP audit, the Commission should reverse USAC's decision.

¹³ As discussed more fully herein, USAC's actions likewise violate the Administrative Procedures Act ("APA") because USAC created a substantive rule without the opportunity for notice and comment. See 5 U.S.C. § 551, *et seq.*

¹⁴ *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order, Docket No. 06-45, DA 09-1821 (Rel. Aug. 17, 2009) ("*Global Crossing Order*").

¹⁵*Id.*

III. USAC's Instructions Defining All PPCC Revenue as "End-User" Revenue and Requiring Face Value Reporting are Invalid

A. Defining All PPCC Revenue as "End-User" Revenue Violates FCC Rules by Requiring Contributions on Wholesale Revenues

NetworkIP correctly notes that the FCC's rules do not specifically address treatment of prepaid calling card ("PPCC") revenues for purposes of USF contribution assessment.¹⁶ But, the Commission's general rules and policies governing the USF extend to PPCCs. As previously discussed, the FCC's rules restrict USF contribution obligations to end-user revenues. In other words, per the Commission's regulations, carriers cannot be required to contribute on the basis of wholesale revenues. The FCC defines end-user revenues to include revenues derived from other carriers only "when such carriers utilize telecommunications services for their own internal uses," noting that "contributions will be assessed at the end-user level, not at the wholesale level."¹⁷ Thus, although the FCC's rules do not specifically define "end user," they clearly exclude wholesale service revenues from revenues subject to contribution. Further, the common definition of "end user" presumes a consumer of services.¹⁸

However, USAC's instructions, as applied to PPCC revenue, achieve the forbidden result of assessing contributions on the wholesale revenues of PPCC providers. First, USAC's instructions arbitrarily define all PPCC revenues as end-user revenues.¹⁹ This capricious

¹⁶ Request at 23.

¹⁷ *In re Federal-State Joint Board on Universal Service*, Report and Order, 12 F.C.C.R. 8776, 9207 ¶ 844 & 9202 ¶ 850 (1997).

¹⁸ Newton's Telecom Dictionary defines an end-user as "an individual, association, corporation, government agency or entity other than an IXC that subscribes to interstate service provided by an Exchange Carrier and does not resell it to others." See Harry Newton, Newton's Telecom Dictionary: 22nd Expanded and Updated Version at 335 (2006).

¹⁹ Instructions at 27-28.

assignment of all PPCC revenue to end users contradicts the Commission's rules and impermissibly exceeds the scope of USAC's authority. The instructions pertaining to PPCC revenue contravene FCC rules because, as previously discussed, the rules limit USF contributions to end-user revenues.²⁰ PPCC revenues, however, do not always - and in fact often do not - derive from end-users. Rather, in the PPCC market, cards are offered via distribution chains with multiple participants.²¹ Sales to distributors do not qualify under the Commission's rules as sales to end users because distributors do not consume the telecommunications service offered and, therefore, are not end users of the cards. Yet, USAC's instructions direct providers to classify this revenue as contribution-eligible, end-user revenue. While informative, USAC's instructions do not supersede FCC rules. FCC rules and regulations govern USAC instructions, and carriers must follow FCC rules, even if this results in a conflict with USAC instructions. The instructions at issue counter FCC rules and are therefore invalid.

B. Defining All PPCC Revenue as "End-User" Revenue Results in Double Payment

As NetworkIP notes in its Request, the instructions pertaining to PPCC revenue are also flawed because they conflict with the FCC's intent to avoid double counting of revenue. In its First USF Report and Order, the FCC committed to a system to assess "contributions in a

²⁰ 47 C.F.R. § 54.706(b); 47 C.F.R. § 54.709(a).

²¹ See Request at 25. Indeed, the instructions recognize the wholesale-distribution model common in prepaid calling card markets, acknowledging that "[p]repaid card providers typically resell the toll service of other carriers." Instructions at 14. See also Ambess Enterprises, Inc. Comments in support of Coalition Petition at 4 & 17, noting that USAC's instructions fail to "recognize the marketplace reality" of the prepaid market - *i.e.*, the wholesale-distributor model.

manner that eliminates the double payment problem.”²² USAC’s instructions define PPCC providers as entities that “provid[e] prepaid calling card services by selling prepaid cards to the public, to distributors, or to retailers.”²³ Therefore, under USAC’s instructions, wholesale calling card providers, distributors and retailers must define PPCC revenue as end-user revenue subject to contribution. Thus, contributions are assessed at *each* of these three levels of distribution. This creates the exact type of “double payment problem” the Commission’s rules are designed to avoid.

While supporting, in large part, the fundamental arguments set forth in the Request, the Coalition does depart from NetworkIP with regard to its acceptance of the Wireline Competition Bureau’s (“Bureau”) characterization of changes made to the 2009 Form 499-A and instructions as nonsubstantive in nature. Specifically, on February 25, 2009, the Bureau announced, in a Public Notice, that the revised FCC Form 499-A and accompanying instructions incorporate only “nonsubstantive clarifications.”²⁴ In the 2009 Instructions, USAC amended the description of the “Prepaid Card” category to provide that “[c]ompanies that do not assign PINS but rather sell cards created by others are marketing agents and do not file.”²⁵

²² Request at 24; *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 F.C.C.R. 8776, 9206-09 ¶ 843 (1997).

²³ Request at 26; Instructions at 14.

²⁴ *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, DA 09-454 (rel. Feb. 25, 2009).

²⁵ Instructions at 14. In describing this change, the Public Notice states that “[t]he description for the Prepaid Card category has been amended to clarify that these providers typically assign personal identification numbers (PINs), and providers that do not assign PINS but sell cards created by others are marketing agents that do not file.”

However, the Bureau and USAC have failed to acknowledge that by taking this action, USAC is “clarifying” something the Commission never defined. Indeed, there exists no evidence or even mention of the term “PIN” or “assignor of PINS” in any FCC order, decision, ruling or regulation. Thus, USAC’s change to the 2009 Form 499-A Instructions is not nonsubstantive in any shape or form. Rather, this “clarification” amounts to USAC’s promulgation of substantive rules in excess of its authority and without requisite notice to and comment from the public. In addition, USAC’s and the FCC’s failure to provide adequate notice and comment to the substantive changes that have a real and significant impact on the prepaid industry contradicts this new Administration’s promises of a new and more open Commission.²⁶ Allowing USAC to issue substantive rules that effect changes to current FCC regulations represents a step backward and thwarts the new Administration’s goals of a more open and responsive government.

C. USAC’s Instructions Requiring Face Value Reporting are Discriminatory and Violate GAAP

Further, even if USAC’s assignment of all PPCC revenues as end-user revenues could be considered valid, USAC’s instructions nevertheless run afoul of the Commission’s rules in another material way. USAC’s instructions to Form 499-A instruct PPCC providers to report

²⁶ See, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293108A1.pdf. During its August 27, 2009 Open Meeting, Commission staff gave a presentation entitled “FCC Agency Reform.” On slide 9 of that presentation, Commission staff committed to “[r]eview our processes to result in more timely, data driven, open and transparent decision making.” Indeed, the White House also announced its commitment to facilitating a more open government and directed that “[e]xecutive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.” http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

revenues received from the sale of prepaid cards at “face value” and to ignore any discounts provided to distributors.²⁷ However, USAC’s instructions ignore the fact that providers rarely - if ever - sell cards at face value. Rather, prepaid providers typically sell cards in bulk at a discount for resale to calling card distributors or retail outlets. Moreover, the instructions also fail to consider the impact of disallowing PPCC providers to report on the revenues actually received. By reporting revenues at face value, providers inevitably report revenues they never actually collected. This scheme violates FCC rules which direct carriers to contribute on the basis of *collected* end-user revenues.²⁸

Not only does this result contradict the FCC’s rules, it also violates the mandate that all contributions to universal service be equitable and nondiscriminatory.²⁹ PPCC providers are the *only* group required to contribute on the basis of revenues that they do not actually collect. All other carriers are entitled to deduct uncollectibles from gross billed end-user revenues.³⁰

The Coalition concurs with NetworkIP’s observation that, in some cases, the instructions may even require a PPCC provider to pay more in USF contributions than it generates in interstate revenues – a result that violates applicable court precedent.³¹ Further, as noted by NetworkIP, the instructions violate the basic principles of GAAP accounting, which prohibit

²⁷ Instructions at 27; 2009 Telecommunications Reporting Worksheet FCC Form 499-A at 6. USAC’s instructions dictate that revenues “should not be reduced or adjusted for discounts provided to distributors or retail establishments.”

²⁸ 47 C.F.R. § 54.709(a); Request at 24.

²⁹ 47 U.S.C. § 254(d).

³⁰ Request at 24; *In the Matter of Federal-State Joint Board on Universal Service, et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 F.C.C.R. 24970, ¶¶ 32-34 (2002); Instructions at 30.

³¹ Request at 28; *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 434 (5th Cir. 1999).

recognition of unearned revenue.³² In other words, revenue that was not actually received may not be recorded under GAAP.

In considering NetworkIP's Request and the impact of USAC's actions on NetworkIP, the Commission should also consider the general and wide-spread inequities stemming from this invalid reporting requirement. To alleviate this discriminatory result, PPCC providers selling cards to distributors should be entitled to deduct any discounts taken by such distributors as an uncollectible in line 422 of FCC Form 499-A or to report only revenues actually received.³³

D. USAC Instructions are Procedurally Infirm

Finally, in addition to conflicting with Commission rules and GAAP, USAC exceeded its authority in publishing such instructions. Because they conflict with FCC rules, USAC's instructions are *per se* invalid. But, the procedures by which they were adopted are likewise *ultra vires*, and, therefore, the instructions are null and void. The APA governs the FCC and its agents, including USAC.³⁴ The APA mandates public notice and the opportunity to comment

³² GAAP authorizes revenue recognition when income is actually realized and earned. See Concepts Statement 5, ¶¶ 83-84; Accounting Research Bulletin 43, Chapter 1A, P1; Accounting Principles Board's (APB) Opinion 10, p 12; *SEC v. Lucent Techs., Inc.*, 363 F.Supp. 2d 708, 712 (D. N.J. 2005); *Sparling v. Daou (In re Daou Sys.)*, 411 F.3d 1006, 1016 (9th Cir. 2005).

³³ See Coalition Petition at 14.

³⁴ *In re InComnet v. Post-Confirmation Committee of Unsecured Creditors of Incomnet Communications Corp.*, 463 F.3d 1064 (9th Cir. 2006); 47 C.F.R. § 54.702; Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21, and Eighth Order on Reconsideration in CC Docket No. 96-45, 13 F.C.C.R. 25058, 25067 (1998); See *In the Matter of 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Order, Rel. Aug. 1, 2000 (discussing USAC's role as a data collection agent for the FCC); See 5 U.S.C. § 706(1)(A); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 445 (3rd Cir. 2004).

on substantive changes to FCC rules.³⁵ USAC, however, effectuated a substantive change by issuing instructions affecting the manner in which PPCC providers contribute to the Fund.³⁶ USAC unilaterally directed providers to report all PPCC revenues as end-user revenue at face value without following the strictures of the APA. That is, the public received no notice or opportunity to comment on these substantive changes to Commission rules. The instructions are therefore invalid by virtue of their procedural infirmity.

IV. Conclusion

In short, the Coalition supports NetworkIP's Request for reversal of USAC's decision in its 2008 audit. USAC improperly interpreted the CCR and exceeded the scope of its administrative authority when it rejected NetworkIP's documentation of compliance with the CCR. Further, USAC wrongfully allocated NetworkIP's PPCC revenues to contribution-eligible end-user revenues. All of USAC's actions referred to in this document conflict with the language of the FCC's rules, contravene Congress' intent, and result in unauthorized and unlawful substantive changes to FCC regulations, in violation of the prescriptions of the APA.

Specifically, USAC's instructions directing providers to report PPCC revenue at face value contravene the FCC's rules and underlying rationale therefor. They unfairly discriminate against PPCC providers and result in overstatement of their contribution obligations under Commission rules. Finally, this "face value" reporting method is inconsistent with GAAP and

³⁵ 5 U.S.C. § 551, *et seq.*

³⁶ The changes were substantive because they are "agency statement[s] of general or particular applicability and future effect." 5 U.S.C. § 551(4); *Central Texas Telephone Cooperative v. FCC*, 402 F.3d 205, 210-11 (D.C. Cir. 2005); Request at 28.

imposes substantive burdens on PPCC providers which are not imposed on providers of nearly identical toll services on a postpaid basis.

For all these reasons, the Coalition respectfully requests that the Commission reverse USAC's decision in this matter and fully consider the issues discussed herein, which are more fully outlined in the Coalition's Petition and Reply Comments.³⁷

Respectfully submitted,

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³⁷ *Supra*, note 2.